Butera Finer Foods, Inc.<sup>1</sup> and Sam Pizzo *and* United Food And Commercial Workers Union, Local 546 & Local 1540<sup>2</sup> Union. Case 13–RD–2301

May 21, 2001

## DECISION AND DIRECTION OF SECOND ELECTION

## BY CHAIRMAN HURTGEN AND MEMBERS TRUESDALE AND WALSH

The National Labor Relations Board, by a three-member panel, has considered objections to a decertification election held May 25, 2000, and the hearing officer's report recommending disposition of them. Pursuant to a Stipulated Election Agreement (Stipulation), the election was conducted at nine Chicago-area polling sites, including those at Elgin and Schaumburg, Illinois. The tally of ballots shows 25 for and 18 against the Union, with 3 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and brief, and has decided to adopt the hearing officer's findings and recommendations only to the extent consistent with this decision and to set aside the election.

The Employer objected to the use of Business Agent Ken Swanson as the Union's election observer. Swanson was not an employee of the Employer. Relying on existing precedent,<sup>3</sup> the hearing officer recommended the Employer's objections be overruled as Swanson had engaged in no misconduct and his presence as an observer had not prejudiced the other parties.<sup>4</sup>

In its exceptions,<sup>5</sup> the Employer asserts that the precedent cited by the hearing officer is inapplicable to decertification (RD) elections because those decisions only concern initial representation (RC) cases. Instead, the

<sup>1</sup> The Employer's name is corrected to conform with the name listed in the Stipulation.

Employer argues that because an RD election involves the participation of an incumbent union, such situation is significantly different from an RC case and, therefore, warrants a different result. We find merit to this contention.

Section 7 of the Act guarantees employees the basic right to choose whether or not they wish to be represented by a labor organization for collective bargaining purposes. Board conducted elections support such right by providing a forum where employees may express their representation choices via secret ballot. Due to the importance of such process, we seek an election environment in which employees may freely and fairly cast votes reflecting their desires. In particular, we strive to ensure that the neutrality of the election process is preserved and that ideal "laboratory" conditions are approached as nearly as possible. *General Shoe Corp.*, 77 NLRB 124, 127 (1948).

In order to maintain the desired neutrality and integrity of our elections, we have established guidelines on who may properly serve as election observers. Thus, for example, we have long held that supervisors as well as other employees closely associated with management may not serve as observers. Paragon Rubber Co., 7 NLRB 965 (1938); International Stamping Co., 97 NLRB 921 (1951); Mid-Continent Spring Co. of Kentucky, 273 NLRB 884 (1984). Similarly, nonemployees may be used as observers only if "reasonable under the circumstances." Browning-Ferris Industries of California, 327 NLRB 704 (1999); Kelley & Hueber, 309 NLRB 578 (1992). Although not controlling, we have also established written guidelines concerning the use of union officials as election observers.

The primary question raised by the exceptions is whether nonemployee agents of an incumbent union should be allowed to serve as observers in a decertification election. The Employer argues that decertification elections substantially differ from other representation cases and, as a result, warrant separate and stricter limitations as to when nonemployee union agents may serve as observers. After careful consideration, we conclude that the neutrality of the election process in a decertification context is best fostered by a bright-line rule prohibiting incumbent labor organizations from using their nonemployee agents as election observers.<sup>7</sup>

<sup>&</sup>lt;sup>2</sup> The Union's name is corrected to reflect the Stipulation. In addition, the caption reflects the fact that Locals 546 and 1540 jointly represent the involved 10-facility unit.

<sup>&</sup>lt;sup>3</sup> Black Bull Carting, 310 NLRB No. 188 (1993) (not reported in Board volumes), enfd. 29 F.3d 44 (2d Cir. 1994); New England Lumber Division, 252 NLRB 95 (1980), enfd. 646 F.2d 1 (1st Cir. 1981); Standby One Associates, 274 NLRB 952 (1985); E-Z Davies Chevrolet, 161 NLRB 1380 (1966), enfd. 395 F.2d 191 (9th Cir. 1968); Carl Simpson Buick, 161 NLRB 1389 (1966), enfd. 395 F.2d 191 (9th Cir. 1968)

<sup>&</sup>lt;sup>4</sup> Although not central to the hearing officer's recommendations, he also noted the testimony of Joseph Butera, the Employer's witness, that during the preelection conference the Board Agent present advised the Union that use of business agents as observers would be objectionable.

<sup>&</sup>lt;sup>5</sup> No exceptions were filed concerning the hearing officer's finding that the record is unclear as to whether Swanson "was asked if he was the observer or was told to be the observer by the Board agent." As a result, we hereby adopt the hearing officer's finding in this regard.

<sup>&</sup>lt;sup>6</sup> CHM, Sec. 11310.2 provides in pertinent part: "A union official may serve as an observer if he/she is also an employee of the employer."

<sup>&</sup>lt;sup>7</sup> The issue of what standard best applies in nondecertification situations is not before us, and we decline to express an opinion on such question.

A key factor in our holding is that in a decertification election employees have accumulated experience with their union's operations and can be expected to view both it and the employer as established collective-bargaining forces. As a result, employees may be unduly influenced by the actual physical presence of nonemployee agents of the incumbent union at the polling site.

The holding in this case is consistent with our requirement that during election hours neither employer nor union agents are permitted in the polling area, and may not electioneer at or near the polling site during hours of voting. See NLRB Casehandling Manual (CHM) Section 11326. See also *Milchem, Inc.*, 170 NLRB 362 (1968). Finally, although CHM Section 11310.2 is admittedly not controlling, our decision here is in harmony with its provisions providing that a union agent may serve as an observer if he/she is an employee of the Employer.

Our colleague would not draw a distinction between certification elections and decertification elections. We disagree. In our view, it is more likely that an employee would be influenced by the presence of a person who is an agent of a union that *is* his bargaining representative than by a person who is an agent of a union that wishes to *become* the bargaining representative. A bargaining representative is the exclusive representative of employees in dealing with an employer over terms and conditions of employment. At the decertification election, the employees are being asked whether to oust that representative. Clearly, it is best to avoid the situation where that vote is cast under the watchful eye of someone who is an agent of that extant representative.

Our colleague argues that having a union/agent as observer poses only potential problems because, if the union loses the election, it will have no influence over the employees. This argument has no merit. At the critical time of the election, the employees obviously do not know how the election will come out. An employee who is inclined to vote against the union could reasonably be concerned that the union will win. Thus, the employee would be tempting fate if he votes against the union whose representative is watching the election process. We also note that, under Board law, the incumbent union remains the representative, even if it loses, until all challenges and objections are resolved.<sup>10</sup>

Our colleague seeks to make much of the fact that Local 1540 Business Agent Swanson was not present at the preelection conference at which the Board agent clearly stated that union agents not be observers. However, an agent of Local 546 (the corepresentative) was there and heard the instructions. In addition, Swanson had a right to be there and, for reasons unknown, chose not to attend.

Our colleague notes that Swanson's serving as observer was the result of an "innocent mixup" by Swanson and the Board Agent. That is, Swanson did not know of the Board Agent's admonition about union agents serving as observers, and the Board Agent did not know of Swanson's status. However, the purpose of the Board's rule is not to punish parties for improper conduct, but rather to protect the integrity of the election process. Accordingly, the "innocence" of Swanson (and the Board Agent) is not the relevant point.

Accordingly, we find that as a nonemployee business agent, Swanson's serving as the Union's election observer in the decertification election in this case constituted objectionable conduct.<sup>11</sup> We therefore direct that the election be set aside<sup>12</sup> and a new election conducted.<sup>13</sup>

## **ORDER**

IT IS ORDERED that the election held on May 25, 2000, is set aside and that this matter is remanded to the Regional Director for Region 13 for the purpose of conducting a new election.

[Direction of Second Election omitted from publication.]

## MEMBER WALSH, dissenting.

Contrary to my colleagues, I would adopt the hearing officer's recommendation to overrule the Employer's objections to the election and to issue a certification of representative. I believe that my colleagues have erred in (a) broadly holding that service by a nonemployee agent of an incumbent union as an observer in a decertification election is, in itself, objectionable conduct warranting the setting aside of such an election, and in (b) promulgating

<sup>&</sup>lt;sup>8</sup> This is not to say that there would be no influence in a certification election. As noted at fn. 7, we do not pass herein on certification elections.

<sup>&</sup>lt;sup>9</sup> The problem also exists where the agent is an employee of the employer. However, that employee of the employer has a right to participate in the election. In view of this factor, we would, on balance, permit his participation as an observer.

<sup>&</sup>lt;sup>10</sup> W. A. Krueger Co., 299 NLRB 914 (1990).

<sup>&</sup>lt;sup>11</sup> We would reach the same result even assuming Swanson served as the Union's observer pursuant to the Board Agent's request. This is so because the more important factor in our analysis is not *how* Swanson came to be an observer, but, rather, that he actually participated in the election process in such capacity.

Swanson's presence at only two of the nine election sites does not call for a different result. Proof that a particular individual's service as an observer prejudiced other parties is "beside the point" where use of such individual fundamentally deviates from the Board's rules. Sunward Materials, 304 NLRB 780 (1991).

<sup>&</sup>lt;sup>13</sup> Applying the new rule in the case in which it is announced is consistent with our precedent. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994).

an unjustified and overbroad per se rule prohibiting nonemployee agents of incumbent unions from serving as observers at decertification elections.

The material facts are undisputed. United Food and Commercial Workers Union Locals 546 and 1540 jointly represent the Employer's meat department employees in a 10-store multilocation unit. The decertification election was conducted on May 25, 2000, with polling at nine stores (there was no polling at the Bartlett store). The overall tally was 25–18 in favor of the Union, with 3 nondeterminative challenged ballots.

At the preelection conference held the day before the election, the Board agent said that it would be considered objectionable for the Employer to use managers, or for the Union to use business agents, as election observers. However, although representatives of the Employer and Local 546 attended the conference, there was no representative of Local 1540 in attendance.

Voting was conducted at, inter alia, the Employer's Elgin and Schaumburg stores. Local 1540 Business Agent Ken Swanson, who was not an employee of the Employer, arrived at the Elgin store about 15 minutes before the start of the scheduled 10-10:30 a.m. polling session. Although Swanson had not intended to serve as an election observer, the Board agent either asked him to serve as an observer or asked him if he was there to serve as an observer.<sup>2</sup> In either event, Swanson served as the Union's observer at the Elgin store and later at the Schaumburg store (where voting was from 12:30-1 While serving as observer at both locations, Swanson did not speak to any voter, and he obscured the union insignia on his shirt by folding it over, and by then further covering the fold with the election observer badge provided to him by the Board agent. Nothing identified him as a representative of Local 1540 during the voting at either location.

In Objection 1, the Employer alleged that (1) the Union interfered with the election by using Swanson as its observer; (2) Swanson engaged in misconduct while

serving as observer; and (3) the Union's use of Swanson as observer prejudiced the Employer and breached the parties' stipulated election agreement. In Objection 2, the Employer alleged that the Board interfered with the election and prejudiced the Employer by permitting the Union to use Swanson as its observer.

The hearing officer recommended that the Employer's objections be overruled, on the grounds, inter alia, that:

- 1. There was no evidence that Swanson engaged in any misconduct (there are no exceptions to this finding); and
- 2. Swanson's mere presence as an observer, as a nonemployee of the Employer and as a business agent of the Union, without more, did not warrant setting aside the election.

In recommending that the Employer's objections be overruled, the hearing officer applied the well-established principle that the mere use of a nonemployee union official as an election observer does not warrant overturning the results of an election where the observer has not engaged in electioneering or other misconduct.<sup>3</sup> In *NLRB v. Black Bull Carting*, the court stated that:

As a general matter, the conduct of a representation election is a purely administrative function with which the court should not interfere absent the most glaring discrimination or abuse. . . . A party seeking to overturn an election on the ground of a procedural irregularity has a heavy burden. The presence of such an irregularity is not itself sufficient to overturn an election. Nor is it sufficient for a party to show merely a "possibility" that the election was unfair. Rather, the challenger must come forward with evidence of actual prejudice resulting from the challenged circumstances. Board has consistently held, with court approval, that the designation of a union official as observer does not warrant overturning an election unless there is evidence that the official engaged in improper conduct while acting in that capacity. [29 F.3d at 46; citations omitted.]

<sup>&</sup>lt;sup>1</sup> He had been instructed by his superior to stop in at the Elgin store on the morning of the election to see if everything was all right.

<sup>&</sup>lt;sup>2</sup> The record is unclear on this point. Swanson first testified that "[t]he Board Agent asked me to [be an observer.]" The transcript reflects that he next testified "[The Board Agent] asked me if I'm, be an observer." [sic]. Next, Swanson was asked in cross examination "And you had been requested to be the observer and you, in fact, opportunity as observer?" [sic]. Swanson replied "Correct." Finally on this point, Swanson was asked "Was it the Board Agent that requested you be an observer at the Schaumburg store as well?" Swanson replied "Yes." The hearing officer found that "Swanson's testimony was unclear as to whether he was asked if he was the observer or was told to be the observer by the Board agent." The hearing officer found it "incredible to believe that the Board agent would have told Swanson to be the observer." The Board agent did not testify.

<sup>&</sup>lt;sup>3</sup> NLRB v. Black Bull Carting, 29 F.3d 44, 46 (2d Cir. 1994), enfg. 310 NLRB No. 188 (1993) (not reported in Board volumes) (having nonemployee union official serve as observer, while procedurally irregular, did not warrant setting aside election; no allegation that observer engaged in any misconduct and no evidence of actual prejudice to fairness of election or to employer resulting from nonemployee union official serving as observer); New England Lumber Division v. NLRB, 646 F.2d 1, 3 (1st Cir. 1981), enfg. 252 NLRB 95 (1980) (having nonemployee union president serve as observer, even if in breach of election stipulation, did not warrant setting aside election; any such breach was immaterial, and designation of union official as observer does not warrant overturning election absent evidence that observer engaged in improper conduct); NLRB v. E-Z Davies Chevrolet, 395 F.2d 191, 193 (9th Cir. 1968), enfg., inter alia, 161 NLRB 1380, 1383 (1966). See also Standby One Associates, 274 NLRB 952, 953 (1985).

Similarly, in NLRB v. E-Z Davies Chevrolet, the court found that having a nonemployee union vice president serve as an election observer did not warrant setting aside election. There was no allegation or evidence that the observer engaged in any misconduct, and the court rejected, as lacking in merit, the employer's contention that the mere presence of the nonemployee union vice president as an observer ipso facto interfered with the election. See also Standby One Associates, 274 NLRB 952, 953 (1985), where the Board found that having a nonemployee union official serve as election observer did not warrant setting aside the state labor board representation election in that case. The Board found that although it is preferable to avoid using nonemployee union representatives as observers, such use did not invalidate the election in that case, where the observer did not engage in electioneering interfering with the election under Milchem, Inc., 170 NLRB 362, 363 (1968).

My colleagues, however, find these precedents and principles to be inapplicable to decertification elections, as in this case. They find that decertification elections are significantly different from representation elections because decertification elections involve the participation of incumbent unions. They ultimately find that the mere presence of a nonemployee union agent as an election observer, without more, might unduly influence voters to vote for the union. In my view, however, it is not significantly more likely that employees would view an incumbent union representative as having more influence over them than a representative of a union who is seeking to become their bargaining agent. And I fail to see how an incumbent union representative's perceived influence over employees' terms and conditions of employment would be likely to inhibit employees who are so inclined from voting against the Union, because if they do so in sufficient numbers, the union representative will no longer have any influence over their terms and conditions of employment. And, to the extent that, as my colleagues contend, an employee might "reasonably be concerned that the union will win," it seems to me that that employee could have the same reasonable concern about a nonincumbent union. I am simply not convinced that, absent misconduct by the union agent, a reasonable employee who is inclined to vote against a union, whether it is an incumbent or not, is going to be influenced by the presence of that agent simply because of the possibility that the vote might go the other way.

In any event, my colleagues perceive the primary issue before the Board in this case to be whether nonemployee agents of an incumbent union should be allowed to serve as observers in a decertification election. My colleagues move from that statement of a broad issue to the promulgation of their broad new rule. But I disagree with their characterization of the issue before us in this case. The real issue before us is—or at least ought to be—whether nonemployee Union Business Agent Ken Swanson's service as an observer interfered with the election *in this case*. The answer is clearly no. It is undisputed that Swanson engaged in *no* misconduct whatsoever. Beyond that, my colleagues do not explain—indeed, in light of their new per se rule, they do not have to—how or why the voters in this case were reasonably unduly influenced in their voting by the mere fact that Swanson was a Union business representative *but not a coworker*.

I find that the straightforward analysis of the facts in this case, set forth above, in which there has been no conduct interfering with the election, but in which my colleagues would nevertheless set the election aside, amply demonstrates the impropriety of establishing a broad per se prohibition against nonemployee agents of incumbent unions serving as observers at decertification elec-Indeed, these facts show that a union official could, in the course of unusual circumstances, legitimately be called upon to serve as an election observer. Here, Local 1540 was not represented at the preelection conference the day before the election. Thus, Swanson was not cautioned, much less prohibited, from being an observer. On election morning, Swanson, with no advance intention of serving as an observer, arrived at the polling site and was confronted with the fact there was no union observer present. In what appears to be an innocent mixup, the Board agent apparently assumed that Swanson was the Union's assigned observer, and did not ask him if he was an employee of the Employer. Swanson, for his part, did not mention that he was a nonemployee union business agent. Swanson, however, did not seek to take any advantage from his service as observer. Indeed, he took pains to hide the fact that he was a union representative, he spoke not a word to any voter, and he engaged in no improper conduct at all.

This odd, but not devious, set of circumstances shows why, in my view, my colleagues have gone too far in instituting a per se rule requiring that decertification elections must be set aside when, for whatever reason, and with whatever actual consequences, a nonemployee official of the incumbent union has served as an election observer—even where, as here, the alternative would be that the Union would have had no observer at all.

<sup>&</sup>lt;sup>4</sup> I agree with my colleagues that the innocence of the circumstances leading up to Swanson's service as an observer is not dispositive of the Employer's objections. What is dispositive is that, regardless of how Swanson became an observer, he engaged in no objectionable conduct while serving as one.

I would certainly agree that the use of nonemployee union officials as decertification election observers should be discouraged. There is clearly potential for trouble in such circumstances.<sup>5</sup> But a union has a right to

have an observer present during polling, both for the purpose of identifying eligible voters *and* for the purpose of insuring that the voting is conducted properly. It may be, as it was here, that the only way to perfect that right, is to have a nonemployee union official pressed into emergency service in that role. Steps like those taken by Swanson here, under such unforeseen circumstances, may be *both* unavoidable in the preservation of a union's right to have an observer, and unobjectionable in the absence of any misconduct on the part of the observer.

Thus, in the absence of any showing of objectionable conduct or of how Swanson's service as observer interfered with the election, I would adopt the hearing officer's recommendations to overrule the Employer's objections and to issue a certification of representative.

<sup>&</sup>lt;sup>5</sup> Thus, my colleagues overstate my position as arguing that having a nonemployee agent of the incumbent union act as an observer at a decertification election poses no problem. I recognize that it poses potential problems. But in my view, we should simply follow our established procedure for addressing situations where a party proposes to use an observer who is alleged to be ineligible. Instead of applying a per se rule and informing the party that use of a nonemployee union representative will always be objectionable, the Board Agent should simply notify the party that use of the nonemployee union representative may result in the setting aside of the election, and allow the election to proceed with that understanding. See *Browning-Ferris Industries of California*, 327 NLRB 704 (1999); NLRB Casehandling Manual (Representation Proceedings), § 11310.2.